

DISCOVERY AND THE DUTY OF COMPETENCE

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INTRODUCTION

The duty of competence is fundamental to the practice of law; yet, many of today's civil litigators risk running afoul of this basic requirement of our profession by failing to appreciate the seismic impact of electronically stored information ("ESI") on the discovery process. Much has been written about the 2006 Amendments to the Federal Rules of Civil Procedure,¹ and an entire industry has been created to address the discovery of ESI.² This Article does not attempt to cover those topics but instead endeavors to evaluate recent opinions issued by a handful of federal judges widely recognized as "pioneers" in e-discovery.³ Along with the evaluation of recent opinions from the e-

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¹ *E.g.*, Bennett B. Borden, Monica McCarroll, Brian C. Vick, & Lauren M. Wheeling, *Four Years Later: How the 2006 Amendments to the Federal Rules Have Reshaped the E-Discovery Landscape and Are Revitalizing the Civil Justice System*, 17 RICH. J.L. & TECH., no. 3, art. 10, Spring 2011, <http://jolt.richmond.edu/v17i3/article10.pdf>; Kenneth J. Withers, *Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure*, 4 NW. J. TECH. & INTELL. PROP. 171 (2006); Jessica DeBono, Comment, *Preventing and Reducing Costs and Burdens Associated with E-Discovery: The 2006 Amendments to the Federal Rules of Civil Procedure*, 59 MERCER L. REV. 963 (2008).

² Evan Koblenz, *Gartner Forecasts E-Discovery Growth to \$2.9 Billion in 2017*, L. TECH. NEWS (Jan. 3, 2013), <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202583045089&slreturn=20130922125157>.

³ These e-discovery forerunners are: Judge Paul W. Grimm, of the United States District Court for the District of Maryland; Judge Lee H. Rosenthal, of the United States District Court for the Southern District of Texas; Judge Shira A. Scheindlin, of the United States District Court for the Southern District of New York; Magistrate Judge John M. Facciola, of the United States District Court for the District of Columbia, Magistrate Judge Nan R. Nolan, of the United States District Court for the Northern District of Illinois; Magistrate Judge Andrew J. Peck, of the United States District Court for the Southern District of New York; and Magistrate Judge David J. Waxse, of the United States District Court for the District of Kansas. *See, e.g.*, Lisa Holton, *A Front-Row Seat: Five Pioneer Judges Who Shaped the Evolution of E-Discovery*, L. TECH. NEWS, Aug. 2013, at 46, 46–49 (profiling Judges Scheindlin, Rosenthal, Peck, Grimm, and Facciola); *see also* David J. Waxse, *"Do I Really Have to do That?" Rule 26(a)(1) Disclosures and Electronic Information*, 10 RICH. J.L. & TECH., no. 5, art. 50, Spring 2004, <http://jolt.richmond.edu/v10i5/article50.pdf> (discussing, two years prior to the 2006 E-Discovery Amendments, what

discovery bench, this Article highlights commentaries and proclamations from a number of the think tanks, models, and conferences that have grown out of the need to address best practices in e-discovery, such as The Sedona Conference, the Electronic Discovery Reference Model, the Text Retrieval Conference Legal Track, and others. The goal of this Article is to analyze the case law and commentary described above to outline the “knowledge, skill, thoroughness and preparation”⁴ a litigator should possess to competently represent a client engaged in civil discovery in federal court today.⁵

I. THE DUTY OF COMPETENCE GENERALLY

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁶

Lawyers’ duties to act with reasonable competence arise from their role as fiduciaries; “that is, a person to whom another person’s affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary.”⁷ Lawyers who fail to understand and comply with the rules of the court in which they practice not only risk losing their client and damaging their reputation with the court, but they may also face disciplinary sanctions, civil liability, and even disbarment.⁸

The expectation that a lawyer provide competent representation may seem self-evident; yet, it was not defined in a clear and concise manner until the adoption of Model Rule of Professional Conduct 1.1 in

electronic information means and how it impacts Federal Rule of Civil Procedure 26(a)(1)(B)).

⁴ MODEL RULES OF PROF’L CONDUCT R. 1.1 (1983).

⁵ This Article focuses on federal rules, but thirty-six of the fifty states have adopted the same or similar rules. See KROLL ONTRACK, STATE COURT RULES AND STATUTES REGARDING ELECTRONICALLY STORED INFORMATION (2012), available at http://www.krollontrack.com/library/Rules_Feb_2012_-_New_Draft.pdf.

⁶ MODEL RULES OF PROF’L CONDUCT R. 1.1 (1983).

⁷ RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 16 (2000).

⁸ See, e.g., *In re Dempsey*, 632 F. Supp. 908, 909–10 (N.D. Cal. 1986) (disbarring a lawyer from practice in federal district court because he “failed to notice motions in accordance with local rules, attempted to subpoena witnesses in an improper manner, consistently made improper or unintelligible objections . . . , and generally conducted himself in a manner that caused the trial judge to question his competence”); *In re Belser*, 287 S.E.2d 139, 139 (S.C. 1982) (censuring a lawyer for his admitted failure to familiarize himself with court rules); see also ABA Ctr. for Prof’l Responsibility, Annotated Model Rules of Professional Conduct 22 (6th ed. 2007) (“[a] lawyer is expected to know [and comply with] the rules of the courts before which the lawyer practices.”).

1983.⁹ Since then, all states and the District of Columbia have adopted some version of Rule 1.1, with most jurisdictions adopting the Model Rule verbatim and a few modifying the duty to clarify or limit it based on circumstances.¹⁰ There is no question that competence extends to discovery, which is governed by the Federal Rules of Civil Procedure and its state equivalents. Consider the recent amendment to Comment 8 to Model Rule 1.1: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”¹¹

A. The 2006 “E-Discovery Amendments” to the Federal Rules of Civil Procedure

Lawyers currently practicing civil litigation, regardless of jurisdiction, would be hard-pressed to identify a greater change to that practice than the 2006 Amendments to the Federal Rules (the “E-Discovery Amendments”).¹² While evidence existed in electronic form long before 2006,¹³ the E-Discovery Amendments incorporated the concept of ESI into every aspect of the civil discovery process. Since 2006, the volume of ESI generated by human beings has grown at an exponential rate and shows no signs of slowing.¹⁴ Moreover, common

⁹ MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983).

¹⁰ Thirty-nine states have adopted Model Rule 1.1 verbatim. See ABA CPR POLICY IMPLEMENTATION COMM., VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT: RULE 1.1: COMPETENCE (Aug. 16, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_1.authcheckdam.pdf. The remaining eleven states and the District of Columbia have adopted some modified version of Rule 1.1. *Id.* Georgia, Michigan, New Hampshire, North Carolina, and Texas require lawyers who lack the requisite skill or knowledge to associate with a lawyer who is competent to handle the matter while Alaska, California, Louisiana, New Jersey, New York, and the District of Columbia all have additional requirements. *Id.*

¹¹ MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2013) (emphasis added). Forty states have adopted the comments along with their adoption of the Model Rules. ABA CPR POLICY IMPLEMENTATION COMM., STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT AND COMMENTS (May 23, 2011), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf>.

¹² Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233 (2006).

¹³ The Advisory Committee first considered changes to the Federal Rules regarding the role of ESI in discovery back in the late 1990s. See COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE 22 (2005) [hereinafter 2005 REPORT OF THE JUDICIAL CONFERENCE].

¹⁴ See MICHAEL R. ARKFELD, PROLIFERATION OF “ELECTRONICALLY STORED INFORMATION” (ESI) AND REIMBURSABLE PRIVATE CLOUD COMPUTING COSTS 4–5 (2011) (stating that “[t]he total amount of digital information created grew from 494 billion

sources of discoverable ESI have expanded beyond business documents and email to databases, social media postings, and text messages, to name but a few.¹⁵

The Advisory Committee proposed the E-Discovery Amendments “to reduce the costs of [electronic] discovery, to increase its efficiency, to increase uniformity of practice, and to encourage the judiciary to participate more actively in case management.”¹⁶ Stated differently, the E-Discovery Amendments were implemented, at least in part, to help lawyers practice e-discovery in a competent manner and to do so as early in the case as possible.¹⁷

Lawyers practicing under the E-Discovery Amendments must consider ESI at every step of the discovery process, starting with preservation. The amendments to Rule 26 require counsel to discuss the preservation of discoverable ESI, to confer on any issues related to the discovery of ESI, and to reach agreements as to how to handle privileged ESI at the Rule 26(f) conference.¹⁸ Then, moving into identification and collection, the amendments to Rule 16 require counsel to identify the sources and scope of that ESI in advance of the Rule 16(b) conference and to be prepared to discuss those issues with their adversary¹⁹ while the amendments to Rule 26 require counsel to include ESI in their initial

gigabytes in 2008, to 800 billion gigabytes . . . in 2009 or a 62 percent increase, to 1.2 [trillion] gigabytes . . . in 2010” and that “enterprise data is doubling every three years”), available at http://www.lexisnexis.com/documents/pdf/20110721073226_large.pdf.

¹⁵ See Jay M. Zitter, Annotation, *Authentication of Electronically Stored Evidence, Including Text Messages and E-Mail*, 34 A.L.R. 6th 253, §§ 4, 5, 7, 9, 11 (2008) (listing cases where e-mails, messages from social networking sites, text messages, databases, and chat room transcripts were allowed into evidence).

¹⁶ ADVISORY COMM. ON THE FED. RULES OF CIVIL PROCEDURE, COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 21 (May 27, 2005) [hereinafter REPORT OF THE CIVIL RULES ADVISORY COMMITTEE], available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf>.

¹⁷ See Steven S. Gensler, *Some Thoughts on the Lawyer's E-evolving Duties in Discovery*, 36 N. KY. L. REV. 521, 532 (2009) (“The belief that lawyers should, if not must, significantly increase their early efforts in order to properly address the demands of e-discovery seems nearly universal.”).

¹⁸ Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233, 1244 (2006); see also FED. R. CIV. P. 26(f); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 31–33, 38–39.

¹⁹ Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1239–40; see also FED. R. CIV. P. 16(b); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 26–27, 29. The language, but not the substance, of Rule 16 has since been amended to read, “provide for disclosure or discovery of electronically stored information” and “any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after *information is produced*.” FED. R. CIV. P. 16(b)(3)(B)(iii)–(iv) (emphasis added).

disclosures.²⁰ Finally, proceeding through search, review, and production, the amendments to Rules 33 and 34 require counsel to consider and to include ESI when drafting responses to interrogatories or producing items in response to requests for production and to produce said ESI in the form requested by the adversary or in a reasonably usable form.²¹

It is for these reasons that this Article posits that civil litigators who continue to profess ignorance about all things e-discovery are essentially admitting that they are unable to fulfill their duty of competence. As Judge Shira A. Scheindlin, the “mother of e-discovery,”²² reminded us in her groundbreaking *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities* opinion:

Courts cannot and do not expect that any party can meet a standard of perfection. Nonetheless, the courts have a right to expect that litigants and counsel will take the necessary steps to ensure that relevant records are preserved when litigation is reasonably anticipated, and that such records are collected, reviewed, and produced to the opposing party. . . . [W]hen this does not happen, the integrity of the judicial process is harmed and the courts are required to fashion a remedy.²³

Fortunately, Judge Scheindlin and a growing cadre of her colleagues on the federal bench, as well as some practitioners dedicated to shaping and guiding the discovery process, have issued numerous opinions, proclamations, and protocols that provide an excellent roadmap for what practitioners and litigants must do to meet the basic threshold of competence when it comes to the practice of e-discovery.

B. Why Else Should We Want to Practice E-Discovery Competently?

Anyone who practices regularly in federal court knows how long and involved the discovery process can be, even in self-proclaimed “Rocket Dockets.”²⁴ Discovery decisions made at the start of the process are

²⁰ Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1241–42; *see also* FED. R. CIV. P. 26(a)(1)(A)(ii); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 30.

²¹ Amendments to Federal Rules of Civil Procedure, 547 U.S. at 1244–47; *see also* FED. R. CIV. P. 33(d), 34(a)–(b); REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16, at 68–78, 80–82.

²² John A. Chandler, *Business and Commercial Litigation in Federal Courts*, GA. BAR J., Feb. 2013, at 64, 65 (book review).

²³ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 461–62 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012) (holding that failure to institute a litigation hold did not constitute gross negligence per se).

²⁴ The Eastern District of Virginia is the original “Rocket Docket,” but has since been followed by the Eastern District of Texas, Northern District of California, Northern

generally based on incomplete information and “best guesses” that often prove to be inadequate or completely wrong as more information is uncovered and analyzed.²⁵ Consequently, the ability to adjust your discovery process as new developments occur is critical to achieving quality in the process. Lawyers who practice discovery in a competent manner, however, should encounter no difficulties in adapting and in satisfying the purpose of the Federal Rules of Civil Procedure; namely, “to secure the just, speedy, and inexpensive determination of every action and proceeding.”²⁶ If that aspirational goal is not sufficient motivation for hardened trial attorneys seeking to advocate zealously for their clients, then perhaps the following guidelines set out by The Sedona Conference, which succinctly define why lawyers should care about competently conducting discovery, might prove persuasive.²⁷

“First, failure to employ a quality e-discovery process can result in failure to uncover or disclose key evidence,” which can affect the outcome of litigation.²⁸ At its essence, discovery is about finding and developing facts to support or refute your client’s position. Conducting discovery in a haphazard or ad hoc manner can cause you to overlook or, even worse, fail to find important evidence that would inform your trial strategy and your client’s decisions about proceeding with a particular matter.

Second, an inadequate discovery process “may allow privileged or confidential information to be inadvertently produced.”²⁹ The risk of accidentally producing privileged or confidential information generally increases with the volume of information being produced. Competent litigators know that although negotiating a protective order under Federal Rule of Civil Procedure 26(c) and clawback orders under Federal

District of Georgia, and Western District of Wisconsin. See Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 121–22 (2008); see also CHRIS BARRY ET AL., PRICEWATERHOUSECOOPERS LLP, 2013 PATENT LITIGATION STUDY: BIG CASES MAKE HEADLINES, WHILE PATENT CASES PROLIFERATE 22 (2013), available at http://www.pwc.com/en_US/us/forensic-services/publications/assets/2013-patent-litigation-study.pdf.

²⁵ *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 274 F.R.D. 63, 74–75 (W.D.N.Y. 2011) (summarizing the history of Rule 26(e)’s response to how discovery information can be incomplete in its initial stages).

²⁶ FED. R. CIV. P. 1.

²⁷ See THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS 8 (Jason R. Baron et al. eds., 2009) [hereinafter ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS], available at <https://thesedonaconference.org/publication/The%20Sedona%20Conference%20Commentary%20on%20Achieving%20Quality%20in%20the%20E-Discovery%20Process> (giving four reasons, besides sanctions, as to why lawyers should care about e-discovery).

²⁸ *Id.*

²⁹ *Id.*

Rule Evidence 502³⁰ greatly diminish the impact of accidentally producing confidential or privileged information, such agreements cannot “unring the bell” when such information is disclosed to the other side.

Third, procedures that measure the quality of an e-discovery process allow timely course corrections and provide greater assurance of accuracy, especially of innovative processes.³¹ As technology adapts and advances to address the challenges of e-discovery, litigators must be able to assess that technology throughout the discovery process, as opposed to waiting until discovery has closed only to find that a set of data was excluded from production for improper purposes, or worse, that a set of data was produced that never should have been.

Fourth, a poorly planned effort can also cost more money in the long run if the deficiencies ultimately require that e-discovery must be redone.³² This simple yet salient point requires little exposition—if you don’t do it right the first time, you run a significant risk of having to do it again, usually under tight deadlines and severe scrutiny, and often at a cost that greatly exceeds what it would have been had it been done properly from the start.

The message of The Sedona Conference’s Commentary was echoed by another author in a slightly different manner: “[P]erhaps litigators should consider that courts no longer recognize e-discovery inexperience (either on the litigator’s or client’s part) as an excuse for failure to produce or comply with discovery obligations and that courts, generally, seem to find e-discovery disputes even more insufferable than traditional discovery disputes.”³³ In other words, the competent practice of e-discovery cannot be limited to the small bar that has embraced the 2006 E-Discovery Amendments, joined The Sedona Conference, et cetera. Rather, it is a fundamental knowledge and skill required of all those who practice under the Federal Rules today.

II. WHAT IS “COMPETENT REPRESENTATION” WHEN IT COMES TO CONDUCTING DISCOVERY UNDER THE FEDERAL RULES TODAY?

There is no question that practicing e-discovery in a competent manner under the Federal Rules is challenging. When the broad scope of the Rules collides with the vast volumes of ESI that businesses and

³⁰ See Ronald J. Hedges, *Federal Rule of Evidence 502: The Intersection of Privilege with Intellectual Property Litigation*, N.J. LAW. MAG., June 2009, at 27, 30.

³¹ ACHIEVING QUALITY IN THE E-DISCOVERY PROCESS, *supra* note 27, at 8.

³² *Id.*

³³ Rachel K. Alexander, *E-Discovery Practice, Theory, and Precedent: Finding the Right Pond, Lure, and Lines Without Going on a Fishing Expedition*, 56 S.D. L. REV. 25, 27 (2011) (footnote omitted).

individuals create on a daily basis and store in a myriad of locations, practitioners can find themselves at a loss for how best to proceed. This is especially true if they fail to implement a comprehensive discovery plan at the start of a case.

The Federal Rules allow discovery on any unprivileged matter that is relevant to the claim or defense of any party.³⁴ This broad scope has a purpose: “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”³⁵ While the scope of discovery under the Federal Rules is exceptionally, and intentionally, broad,³⁶ it is not limitless. Courts have the authority, and indeed the obligation, to limit discovery for a variety of reasons, including a determination that the discovery sought is not proportional to the needs of the case.³⁷ Magistrate Judge John M. Facciola described the obligation as follows:

All discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court’s obligation to balance its utility against its cost. More specifically, the court is obliged to consider whether (1) the discovery sought is unreasonably cumulative or duplicative, or obtainable from a cheaper and more convenient source; (2) the party seeking the discovery has had ample opportunity to obtain the sought information by earlier discovery; or (3) the burden of the discovery outweighs its utility. The latter requires the court to consider (1) the needs of the case; (2) the amount in controversy; (3) the parties’ resources; (4) the importance of the issues at stake in the action; and (5) the importance of the discovery in resolving the issues.³⁸

Proportionality has become a touchstone of competency in e-discovery because of the inherent conflict between the broad scope of

³⁴ FED. R. CIV. P. 26(b)(1).

³⁵ *Norfolk Cnty. Ret. Sys. v. Ustian*, No. 07 C 7014, 2010 WL 1489996, at *2 (N.D. Ill. Apr. 13, 2010) (quoting *Thomas Consol. Indus., Inc.*, No. 04 CV 6185, 2005 WL 3776322, at *6 (N.D. Ill. May 19, 2005)); *see also* *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428 (6th Cir. 1996) (“The rules of discovery . . . do not permit parties to withhold material simply because the opponent could discover it on his or her own.”).

³⁶ FED. R. CIV. P. 26(b)(1) (“Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

³⁷ *See id.* at 26(b)(2)(C).

³⁸ *United States ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 240–41 (D.D.C. 2011) (citations omitted).

discovery and the vast volumes of information subject to discovery.³⁹ The traditional discovery request to “produce all documents or information relating to X topic” has the potential to yield innumerable technically responsive items in even the simplest dispute involving the smallest of companies. Thus, courts are being called on with greater frequency to determine whether the discovery efforts of a party are in proportion to what is called for in the case, and that assessment of proportionality is informed by the reasonableness of a party’s actions. For example, in the context of preservation of evidence, then-Magistrate Judge Paul W. Grimm wrote that the “assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence.”⁴⁰

As one of the authors of the E-Discovery Amendments, Judge Lee H. Rosenthal⁴¹ is uniquely situated to assess the interplay between reasonableness, proportionality, and the duty to preserve and similar duties required in the practice of e-discovery. In the seminal case of *Rimkus Consulting Group, Inc. v. Cammarata*,⁴² she found:

Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether

³⁹ See generally 2005 REPORT OF THE JUDICIAL CONFERENCE, *supra* note 13, at 22–23 (explaining the advisory committee’s mission to devise mechanisms for providing full disclosure in the context of growing ESI); George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH., no. 3, art. 10, Spring 2007, at 8–10, <http://jolt.richmond.edu/v13i3/article10.pdf> (providing examples of the amount of electronic information produced today); *Data, Data Everywhere: A Special Report on Managing Information*, ECONOMIST, Feb. 27, 2010, at 1, available at <http://www.emc.com/collateral/analyst-reports/ar-the-economist-data-data-everywhere.pdf> (describing the enormous amount of ESI created today and citing Wal-Mart’s vast databases as an example, which hold ESI equivalent to 167 times the amount of information in all the books in the Library of Congress); Bernadette Starzee, *Settling on the Double-Edged Sword of Technology*, LONG ISLAND BUS. NEWS, Jan. 14–20, 2011, at 29A (giving an attorney’s experience with the large amount of ESI produced during discovery); *About the Library*, LIBR. CONGRESS, http://www.loc.gov/about/generalinfo.html#2007_at_a_glance (last visited Oct. 28, 2013) (giving statistics showing the immense volume of data received by the Library of Congress).

⁴⁰ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 523 (D. Md. 2010). “[R]easonableness is the key to determining whether or not a party breached its duty to preserve evidence.” *Id.* (alteration in original) (quoting *Jones v. Bremen High Sch. Dist.* 228, No. 08 C 3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010)). On January 29, 2013, now-District Court Judge Grimm issued a standard Discovery Order that specifically incorporates reasonableness and proportionality into the Court’s consideration of whether a party has complied with its duty to preserve evidence. Paul W. Grimm, Discovery Order (Jan. 29, 2013), available at http://iaals.du.edu/images/wygwam/documents/publications/Grimm_Discovery_Order.pdf.

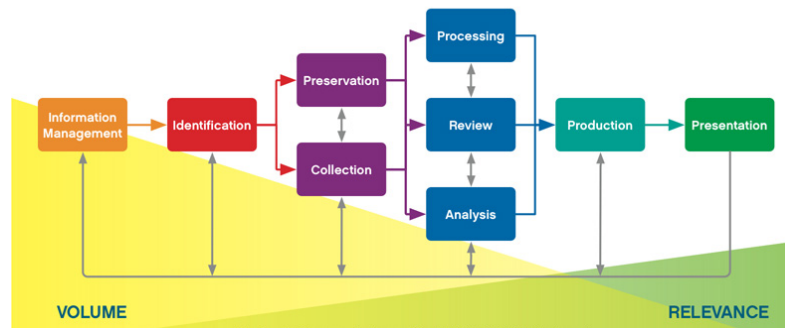
⁴¹ REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, *supra* note 16.

⁴² *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598 (S.D. Tex. 2010).

what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards. As Judge Scheindlin pointed out in *Pension Committee*, that analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.⁴³

While practitioners would love it if such a checklist were available, there are other resources that allow counsel to evaluate and to assess what is required of them when practicing e-discovery. An excellent starting place is the Electronic Discovery Reference Model (“EDRM”), which provides a visual representation of the various phases of discovery.

Figure 1: Electronic Discovery Reference Model⁴⁴



Moving chronologically through the phases of discovery as set out in the EDRM can help lawyers ensure that they are practicing e-discovery in a competent manner, as set forth in more detail below.

A. *The Duty of Competence in Preservation*

“Proceeding chronologically, the first step in any discovery effort is the preservation of relevant information.”⁴⁵ The duty to preserve arises or is triggered once litigation becomes reasonably likely,⁴⁶ which, by definition, occurs before a lawsuit is filed for a plaintiff, and at the latest, when a lawsuit is served on a defendant.⁴⁷ The duty arises from the

⁴³ *Id.* at 613.

⁴⁴ Copyright 2009, Electronic Discovery Reference Model, <http://www.edrm.net/resources/guides/edrm-framework-guides> (last visited Oct. 28, 2013).

⁴⁵ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 464 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012).

⁴⁶ *See, e.g., Victor Stanley*, 269 F.R.D. at 521–22; *Rimkus Consulting Grp.*, 688 F. Supp. 2d at 612; *Pension Comm.*, 685 F. Supp. 2d at 466.

⁴⁷ *See Sekisui Am. Corp. v. Hart*, No. 12 CIV. 3479, 2013 WL 4116322, at *1 (S.D.N.Y. Aug. 15, 2013); *Victor Stanley*, 269 F.R.D. at 516; *Rimkus Consulting Grp.*, 688

common law and is a duty the litigants owe to the court, not merely to each other.⁴⁸ Complying with this duty can be fraught with peril when counsel is competent⁴⁹ and can result in the “death penalty” of a case—terminating sanctions—when counsel is unwilling or unable to ensure that a client is undertaking the necessary steps to preserve all potentially relevant information, whether it is helpful or harmful to the client’s case.⁵⁰

The duty to preserve potentially relevant evidence may be the most important duty a litigant has, in that a failure to meet that duty, whether intentional or merely negligent, can deprive the court of the ability to properly assess the dispute before it. Furthermore, failure to uphold that duty can result in sanctions against the litigant, and sometimes against counsel too, running the gamut from additional discovery to terminating sanctions.⁵¹ Yet, more often than not, this duty generally arises well before counsel is engaged or otherwise consulted, and for at least one party, and often for both, the duty arises before there is “a case or controversy” to which the Rules apply.⁵² Over the last few years, there has been a lively debate regarding whether a new Rule

F. Supp. 2d at 613; *Pension Comm.*, 685 F. Supp. 2d at 466 (“A Plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.”).

⁴⁸ *Victor Stanley*, 269 F.R.D. at 525 (footnote omitted) (“What heretofore usually has been implicit—but seldom stated—in opinions concerning spoliation is that, with the exception of a few jurisdictions that consider spoliation to be an actionable tort, the duty to preserve evidence relevant to litigation of a claim is a duty owed to the court, not to a party’s adversary.”); see generally Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 386 (2008) (describing the court’s inherent power that stems from the common-law preservation duty).

⁴⁹ See, e.g., *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 501, 509–10 (E.D. Va. 2011) (holding that, although litigation hold orders were issued, monetary sanctions were necessary for the spoliation of evidence and that, although it was a close call, default judgment was not appropriate).

⁵⁰ See, e.g., *Suntrust Mortg. v. AIG United Guar. Corp.*, 3:09CV529, 2011 WL 1225989, at *26–28 (E.D. Va. Mar. 29, 2011) (stating that the court has the power to order dismissal when a party perpetrates fraud or litigation abuse and weighing factors of the egregiousness of the plaintiff’s wrongdoing in deciding whether to dismiss the case but ultimately holding that a less severe sanction was appropriate), *aff’d sub nom.* *Suntrust Mortg., Inc. v. United Guar. Residential Ins. Co. of N.C.*, 508 F. App’x 243, 254–55 (4th Cir. 2013); *Victor Stanley*, 269 F.R.D. at 540–41 (entering default judgment as to one count due to the defendant’s spoliation of discoverable ESI).

⁵¹ See, e.g., *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462–63 (4th Cir. 1993) (opining as to a court’s power to punish or even dismiss a case when there is wrongful conduct and using a six-factor test to determine whether it is appropriate to dismiss a case due to spoliation).

⁵² See A. Benjamin Spencer, *The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court*, 79 FORDHAM L. REV. 2005, 2006–08 (2011).

should be promulgated to more accurately define when the duty of preservation arises and what litigants must do to comply with it.⁵³

As a common law duty, the duty to preserve potentially relevant evidence long predates the advent of electronically stored information.⁵⁴ It makes perfect sense that a litigant who alleges that his adversary came into possession of his ring through theft is entitled to have that ring proffered to the court in order for the court to properly resolve the dispute. Likewise, if a litigant claims that his car burst into flames due to faulty parts, he must make those parts available to his adversary for inspection and analysis so the court can properly adjudicate the dispute.⁵⁵ What is harder to grasp is how the availability of a certain piece of data can similarly effect the outcome of a dispute, especially when hundreds of thousands, if not millions, of other pieces of data have been made available.

Prior to the 2006 Amendments, when the discovery rules related primarily to paper documents and other tangible items, competent counsel merely had to caution their clients against throwing away or shredding documents or items once the duty to preserve attached.⁵⁶ This was not a particularly challenging task given that the volume of documents at issue in even the largest, most complex class action was a fraction of the data that is now regularly exchanged in today's run-of-the-mill cases. Litigants also intuitively understood that it was in their best interest to preserve documents related to the dispute, with the rare exception of those bad actors who elected to destroy evidence to keep it out of an adversary's hands.

⁵³ See, e.g., Thomas Y. Allman, *Local Rules, Standing Orders, and Model Protocols: Where the Rubber Meets the (E-Discovery) Road*, 19 RICH. J.L. & TECH., no. 3, art. 8, Spring 2013, at 24–27, <http://jolt.richmond.edu/v19i3/article8.pdf>; Memorandum from Andrea Kuperman to the Discovery Subcommittee of the Civil Rules Advisory Committee, Case Law on Elements of a Potential Preservation Rule 1–17 (Sept. 23, 2010), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

⁵⁴ See, e.g., *Armory v. Delamirie*, (1722) 93 Eng. Rep. 664 (K.B.) 664 (requiring the defendant to produce the jewel that he removed from a ring as evidence, otherwise the jury “should presume the strongest against him, and make the value of the best jewels the measure of their damages”).

⁵⁵ *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 589–91 (4th Cir. 2001).

⁵⁶ See, e.g., *Arthur Anderson LLP v. United States*, 544 U.S. 696, 698 (2005) (holding that Arthur Anderson, Enron's auditor, did not knowingly persuade Enron employees to destroy documents because Arthur Anderson instructed employees to destroy documents pursuant to its document retention policy up until the time a formal investigation was opened).

In the current “Information Age,”⁵⁷ however, the sheer volume of data at issue in even the simplest of disputes, coupled with the fact that ESI is constantly being modified and altered often without users being aware of that fact,⁵⁸ require attorneys to take a more proactive approach to preservation. It demands that competent attorneys advise their clients against not only the willful destruction of potentially relevant information (i.e. “Don’t wipe your laptop.”), but also against the merely negligent, even unwitting destruction of potentially relevant information (i.e. “If you have an auto-delete function as part of your email program, be sure to turn it off for the people who might have potentially relevant information until we take steps to identify and collect that information.”).

In order to competently counsel clients regarding the duty to preserve today, lawyers must first educate themselves generally about the various forms of ESI and how each form is created, stored, modified, and deleted. Lawyers must also educate themselves specifically as to what potentially relevant ESI a particular client creates, stores, modifies, and deletes and as to how it does so. Due to the fact that the duty to preserve has generally attached sometime prior to counsel getting involved, this latter task often must take place under extremely tight time frames. Therefore, it is imperative that attorneys take the time to educate themselves as to the former issues outside the confines of a particular case.

Computers, backup tapes, hard drives, archives, databases, smartphones, the cloud, et cetera, are all simply containers of information, analogous to the folders, desk drawers, file cabinets, and warehouses full of documents that were the primary source of discovery materials in the years prior to the 2006 Amendments.⁵⁹ In the good old days of paper discovery, it was almost unheard of for a lawyer to advise a client to save every document in a warehouse, sight unseen and without having any idea what those documents were, “just in case” they might be relevant to the lawsuit at hand. However, it is exceedingly common in the current Information Age for risk-averse lawyers to take the path of most caution and least resistance and to advise clients to “save

⁵⁷ MICROSOFT ENCARTA COLLEGE DICTIONARY 739 (2001) (defining the information age as “a period characterized by widespread electronic access to information through the use of computer technology”).

⁵⁸ See Wayne S. Moskowitz, *Electronic Discovery Under the New Federal Rules*, BENCH & BAR MINN. (Dec. 2006), <http://www.mnbar.org/benchandbar/2006/dec06/electronic.htm>.

⁵⁹ Note that paper documents are still subject to discovery and, in some cases, are still voluminous, but that is now in addition to the massive data stores that most companies have.

everything,” including ceasing the rotation of disaster recovery backup tapes and imaging every hard drive, in an effort to ensure that the client is satisfying its duty to preserve.

The unintended consequence of such a cautious strategy, however, is that even the smallest companies will find themselves drowning quickly in data if they are prohibited from deleting anything during the course of a years-long lawsuit, or even just for the few months it may take for the parties to reach an agreement as to preservation. Moreover, to truly “save everything” for some indefinite time period beyond the business utility of such information means that information unrelated to the dispute at hand will not be destroyed during the ordinary course of business. Thus, it may be available and subject to discovery when another dispute arises during the interim of the first dispute, and so on and so on, until companies find themselves maintaining warehouses full of backup tapes and other data indefinitely, at great cost and even greater risk, all because counsel advised them that they must “save everything.”

As far back as *Zubulake v. UBS Warburg LLC*, courts have recognized that the “save everything” method is neither a reasonable nor practical means to satisfy a party’s preservation obligation.⁶⁰ However, in *Zubulake*, Judge Scheindlin also made it clear that a party, through counsel, must be able to explain and defend why it did or did not save certain documents or data that later proved to be pertinent to the dispute.⁶¹ However, before lawyers and litigants can make reasonable, practical, and defensible decisions as to what must be preserved for purposes of a lawsuit and what may properly be deleted or destroyed, they must first determine what types of information they may have that could reasonably be considered potentially relevant to any claim or defense in a suit. Then, they must determine the sources of that information and how accessible those sources might be.⁶²

The process of discerning what to preserve and how is sometimes made simpler by determining first who may have knowledge or information about the issues in dispute, and then determining what potentially relevant documents or data such potential witnesses or

⁶⁰ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 432–34 (S.D.N.Y. 2004) (requiring that counsel take reasonable steps to ensure preservation beyond just instructing their client to save everything).

⁶¹ *Id.* at 436, 439–40. This concept was codified in the 2006 Amendments: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” Amendments to Federal Rules of Civil Procedure, 547 U.S. 1233, 1247 (2006); *see also* FED. R. CIV. P. 37(e).

⁶² *See Zubulake*, 229 F.R.D. at 432–34; Alexander, *supra* note 33, at 43–44, 54.

custodians may have in their possession, custody, or control.⁶³ When utilizing a “custodians-first” model,⁶⁴ however, competent counsel must bear in mind that much of the information or data generated by a company or an entity is not maintained or controlled by a single individual (e.g., an accounting database). Such potentially relevant, non-custodial sources must be included in the scope of a preservation notice or protocol.

Because counsel may not be engaged until after the duty to preserve has attached, it is critical that one of the first steps a competent litigator takes when working on a new lawsuit is to promptly inform his or her client regarding the duty to preserve and to determine whether the client has taken the appropriate steps to comply with the duty. If the client has not taken appropriate or sufficient steps to comply with its duty to preserve, regardless of whether such a decision was conscious or simply uninformed, competent counsel must ensure that appropriate steps are taken promptly to satisfy the duty to preserve and simultaneously must determine whether any potentially relevant information has been accidentally or intentionally destroyed. Time is especially of the essence regarding this latter determination because there are short windows where deleted data can be recovered fairly

⁶³ Courts construe the “possession, custody, or control” of documents differently. Some courts apply a “practical ability to obtain” standard. *See, e.g., In re NTL, Inc. Sec. Litig.*, 244 F.R.D 179, 195 (S.D.N.Y. 2007) (quoting *Bank of New York v. Meridien BIAO Bank Tanzania Ltd.*, 171 F.R.D. 135, 146 (S.D.N.Y. 1997)) (“[C]ontrol’ does not require that the party have legal ownership or actual physical possession of the documents at issue; rather, documents are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.”), *aff’d sub nom. Gordon Partners v. Blumenthal*, No. 02 Civ. 7377(LAK), 2007 WL 1518632 (S.D.N.Y. May 17, 2007). Other courts adopt an “ability to obtain” understanding that strains the meaning of control. *See, e.g., Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (noting that “the fact that a party could obtain a document if it tried hard enough and maybe if it didn’t try hard at all does not mean that the document is in its possession, custody, or control; in fact it means the opposite”); *Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) (“Adopting the ‘ability to obtain’ test would usurp these principles, allowing parties to obtain documents from non-parties who were in no way controlled by either party.”).

⁶⁴ U.S. DIST. COURT FOR THE N. DIST. OF CAL., GUIDELINES FOR THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION 2, *available at* http://www.cand.uscourts.gov/filelibrary/1117/ESI_Guidelines.pdf (last visited Oct. 28, 2013) (stating that a useful issue to discuss in a Rule 26(f) Meet and Confer is the “phasing of discovery so that discovery occurs first from sources most likely to contain relevant and discoverable information”); F. Matthew Ralph & Caroline B. Sweeney, *E-Discovery and Antitrust Litigation*, ANTITRUST, Fall 2011, at 58, 61 (“By collecting and processing ESI from the highest priority custodians first, it may be possible to refine search methodologies for custodians whose documents are to be produced later, or to confirm that no further productions are necessary.”).

easily,⁶⁵ but once those windows close, recovery of deleted data can become very expensive or even impossible.

As for the former determination, the first thing counsel will want to know is whether a client has issued a legal hold notice, also called a “litigation hold,” or a notice of preservation.⁶⁶ A legal hold notice informs key witnesses, custodians, and/or other stakeholders within an organization about the lawsuit and the duty to preserve potentially relevant information relating to the lawsuit.⁶⁷ While the contents of a legal hold notice are generally considered work product, the fact of whether a hold was issued, when, and to whom is generally discoverable.⁶⁸

While it was generally accepted after the 2006 Amendments that issuing a written legal hold notice was a “best practice,”⁶⁹ Judge Scheindlin rocked the e-discovery world again, in January 2010, when she held in *Pension Committee* that the failure to issue a written litigation hold was “gross negligence.”⁷⁰ Never before had such a bright line been drawn regarding what parties and their counsel must do to satisfy the duty to preserve and concomitantly avoid spoliation sanctions. Many found the line to be too bright, and a chorus of legal

⁶⁵ For example, the Microsoft Exchange “database dumpster” retains items, by default, for fourteen days. IBM, TECHNICAL REPORT: IBM SYSTEM STORAGE N SERIES AND MICROSOFT EXCHANGE SERVER 2007 BEST PRACTICES GUIDE 17 (2008).

⁶⁶ *E.g.*, *United States v. Quattrone*, 441 F.3d 153, 190 (2d Cir. 2006) (using the term “document-preservation notices”); *Apple Inc. v. Samsung Elecs. Co.*, 881 F. Supp. 2d 1132, 1137 (N.D. Cal. 2012) (utilizing the term “litigation hold”); *Major Tours, Inc. v. Colorel*, No. 05-cv-3091(JBS/JS), 2009 WL 2413631, at *1 n.1 (D.N.J. Aug. 4, 2009) (citation omitted) (indicating many terms used for this notice: “hold,” “hold order,” “suspension order,” “freeze notice,” “preservation order,” or “hold notice”).

⁶⁷ *See Major Tours, Inc.*, 2009 WL 2413631, at 1 n.1 (citation omitted) (internal quotation marks omitted) (defining a legal hold as a communication “that suspends the normal disposition or processing of records”); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) (recognizing the duty to preserve through the use of a litigation hold to communicate with information technology personnel, employees, and key players in the litigation).

⁶⁸ *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-VCF, 2011 WL 5598306, at *2 (D. Nev. Nov. 17, 2011).

⁶⁹ THE SEDONA CONFERENCE, THE SEDONA GUIDELINES: BEST PRACTICE GUIDELINES & COMMENTARY FOR MANAGING INFORMATION & RECORDS IN THE ELECTRONIC AGE 50 (Lori Ann Wagner et al. eds., 2d ed. 2007), available at <https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records> (“Although documenting preservation efforts is a recommended practice, there is no legal requirement mandating the creation of such a ‘paper trail.’”); The Sedona Conference, *The Sedona Conference Commentary on Legal Holds: The Trigger & the Process*, 11 SEDONA CONF. J. 265, 267–70 (2010).

⁷⁰ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 471 (S.D.N.Y. 2010), abrogated by *Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012).

commentators and other members of the judiciary voiced their disagreement with the opinion.⁷¹ Ultimately, two years later, in *Chin v. Port Authority of New York & New Jersey*, the Second Circuit expressly overruled this portion of Judge Scheindlin's *Pension Committee* opinion.⁷² While the line may have dimmed a bit, issuing a legal hold, even if it is only verbal, remains essential to the competent representation of a client involved in discovery under the Federal Rules after the 2006 E-Discovery Amendments.

When a discovery dispute arises and there are allegations that a party has failed to properly preserve pertinent information, an attorney must be prepared to respond. Whether it be through written discovery responses, at a Rule 30(b)(6) deposition, during the "meet and confer" process, or in motions practice and the subsequent hearing, competent lawyers must be able to articulate the steps their clients took to comply with their duty to preserve. Counsel must know whether their clients issued a written legal hold notice, when, and to whom, or whether their preservation steps consisted of a call to IT to save all backup tapes and image all hard drives, or something somewhere in between. Counsel also must be prepared to explain not only what steps their clients took to preserve potentially relevant information, but also why they took those steps and not others. While counsel is not required to gain a computer science background in advance of such an analysis, counsel must be prepared to ask the right questions and understand the answers provided regarding what has been preserved and what has not, and why not, in order to convey the answers in a clear and concise manner to both opposing counsel and the court, if necessary.

Whether a legal hold has been issued and whether it was in writing comprises only one aspect of compliance with the duty to preserve. Competent lawyers also must determine whether simply informing key custodians and other stakeholders of the duty is sufficient to ensure that they have complied with the duty.⁷³ For example, counsel will need to determine the extent to which custodians or users have the ability to delete information from an individual workstation or a network location, regardless of whether they also have the authority and/or discretion to

⁷¹ See, e.g., *Surowiec v. Capital Title Agency, Inc.*, 790 F. Supp. 2d 997, 1007 (D. Ariz. 2011) ("The Court disagrees with *Pension Committee's* Holding that a failure to issue a litigation hold constitutes gross negligence per se."); *Rimkus Consulting Grp., Inc., v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010) (opposing a bright-line standard regarding what is acceptable and unacceptable conduct in preserving information).

⁷² *Chin*, 685 F.3d at 162.

⁷³ *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439 (S.D.N.Y. 2004) ("[C]ounsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced.").

do so. Then, they need to weigh that information against the allegations in the case to determine whether “preserving in place” is an acceptable option or whether other steps must be taken to ensure that potentially relevant information is, in fact, preserved.⁷⁴

Another aspect of preservation that competent counsel must consider and address is whether third parties may be in possession, custody, or control of a client’s potentially relevant information.⁷⁵ As more and more companies move their data to the Cloud and/or utilize software applications and other technology wherein their data is stored in a location other than an onsite server or piece of hardware, the issues of control and access to one’s own data are becoming more prevalent. Counsel must be prepared to evaluate any agreements their clients have entered into regarding the storage of data in order to determine when and how the client can access and secure that data for discovery purposes. Also, counsel must alert opposing counsel and even the Court, if necessary, if they identify any potential issues caused by the third-party arrangement that could interfere with their clients’ duty to preserve.

Similar issues regarding the role of third parties arise in the context of preservation with social media. To the extent that potentially relevant evidence may exist on a party’s website, Facebook page, online blog, or Twitter feed, this potentially relevant evidence also must be preserved, and it must be preserved in a manner that does not alter or decrease the functionality of the underlying data. Failing to take the proper steps to secure dynamic data can have devastating consequences.⁷⁶

B. The Duty of Competence in Identification and Collection

“The next step in the discovery process is collection and review.”⁷⁷ In order to make competent decisions as to what to collect and eventually

⁷⁴ Certain types of cases warn against preservation by custodians and/or preservation in place (e.g., a sexual harassment suit that relies on the alleged harasser to preserve potentially relevant information). *See* *Jones v. Bremen High Sch.* Dist. 288, No. 08 C 3548, 2010 WL 2106640, at *7, *9–10 (N.D. Ill. May 25, 2010) (holding that it was “unreasonable to allow a party’s interested employees to make the decision about the relevance” of discoverable emails and that, even though there was no obvious fraud in the case, “the defendant’s attempts to preserve evidence were reckless and grossly negligent”).

⁷⁵ *See supra* note 63 and accompanying text.

⁷⁶ *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 702–03 (Va. 2013) (sanctioning the attorney in the amount of \$542,000 and the defendant in the amount of \$180,000 for spoliation of evidence when the defendant intentionally removed items from his Facebook page on advice of counsel).

⁷⁷ *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010), *abrogated by* *Chin v. Port Auth.*, 685 F.3d 135, 162 (2d Cir. 2012).

review, however, competent lawyers first must identify the relevant custodians or witnesses, along with the sources of potentially responsive data in their control, as well as any non-custodial sources. This task is arguably as important to the litigation process as satisfying the duty to preserve—if a party fails to identify a key witness or source of information, then the goals of discovery may be thwarted, just as they can be when a party fails to preserve and, thus, produce, pertinent evidence.⁷⁸

Identification of key custodians is often inextricably intertwined with the duty to preserve, especially to the extent a party is relying primarily on custodian-based preservation to satisfy its duty to preserve.⁷⁹ Judge Scheindlin reminded us how important identification of key players is to the discovery process in *Pension Committee*:

After a discovery duty is well established, the failure to adhere to contemporary standards can be considered gross negligence. Thus, after the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.⁸⁰

While, at first glance, the identification of key players or custodians and the sources of data under their control that would likely contain potentially relevant information would seem like a fairly easy task, similar to most things in discovery, it can prove to be a challenge. Even

⁷⁸ See, e.g., *Abrahamsen v. Trans-State Express, Inc.*, 92 F.3d 425, 428 (6th Cir. 1996) (“The rules of discovery, however, do not permit parties to withhold material simply because the opponent could discover it on his or her own.”); *Stafford v. Jewelers Mut. Ins. Co.*, No. 3:12-CV-050, 2012 WL 6568325, at *4 (S.D. Ohio Dec. 17, 2012), *motion to reopen granted*, No. 3:12-CV-050, 2013 WL 796272 (S.D. Ohio Mar. 4, 2013); *Norfolk Cnty. Ret. Sys. v. Ustian*, No. 07 C 7014, 2010 WL 1489996, at *6–7 (N.D. Ill. Apr. 13, 2010) (granting a motion to compel production of documents previously withheld even though it would require “a fairly extensive search”).

⁷⁹ See *supra* note 64 and accompanying text.

⁸⁰ *Pension Comm.*, 685 F.Supp. 2d at 471 (emphasis added). For whatever reason, Judge Scheindlin's holding that the failure to identify key players and ensure the preservation of their data supported a finding of gross negligence did not generate the same hue and cry that surrounded her holding regarding the failure to issue a written litigation hold. See generally Michael W. Deyo, *Deconstructing Pension Committee: The Evolving Rules of Evidence Spoliation and Sanctions in the Electronic Discovery Era*, 75 ALB. L. REV. 305, 306–07 (2012) (examining and discussing the criticisms of the *Pension Committee* opinion).

the most competent lawyers making reasonable inquiries of their clients at the outset of a case are acting on, at best, somewhat incomplete and, at worst, wholly inaccurate information when identifying custodians who may have knowledge or information relating to the issues in dispute, whether for purposes of preservation or for initial disclosures.⁸¹

As the issues are developed and refined and information becomes more complete and accurate, competent counsel must revisit the initial list of custodians or witnesses with potentially relevant information that were placed under legal hold and/or provided in initial disclosure and determine whether additional preservation steps must be taken and/or supplemental disclosures made.⁸² In those cases or jurisdictions where initial disclosures are not required, counsel may be tempted to delay identifying key witnesses or custodians until receiving a discovery request for that information, but such delay could prove costly, if not fatal, if it leads to the destruction of evidence.⁸³

Postponing decisions about discovery, including when to discuss issues with opposing counsel, is rarely, if ever, a prudent course of action. While many members of the defense bar rejoiced when the Supreme Court handed down the *Twombly*⁸⁴ and *Iqbal*⁸⁵ decisions, Magistrate Judge Nan R. Nolan recently reminded litigants that they cannot put off discovery efforts solely based on the belief that the case can and will be dismissed under these new standards:

[O]ne argument that is usually deemed insufficient to support a stay of discovery is that a party intends to file, or has already filed, a motion to dismiss for failure to state a claim under Rule 12(b)(6). . . . *Twombly* and *Iqbal* do not dictate that a motion to stay [discovery] should be granted every time a motion to dismiss is placed before the Court.⁸⁶

Courts are urging parties to confer about custodians and data sources early and often. While the identification of custodians and

⁸¹ FED. R. CIV. P. 26(a)(1)(A)(i)–(ii).

⁸² FED. R. CIV. P. 26(g)(1)(A) (“Every disclosure . . . and every discovery request, response, or objection must be signed by at least one attorney of record By signing, an attorney or party certifies that to the best of the person’s knowledge, information, and belief formed after a reasonable inquiry: with respect to the disclosure, it is complete and correct as of the time it is made”).

⁸³ See, e.g., *Allstate Ins. Co. v. Dooley*, 243 P.3d 197, 203–04 (Alaska 2010) (stating that “[a] party who intentionally withholds disclosable evidence for a prolonged period of time . . . fraudulently delays another party’s access to such evidence in violation of an existing duty to disclose” and holding that a claim for fraudulent concealment of evidence was appropriate).

⁸⁴ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

⁸⁵ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1954 (2009).

⁸⁶ *Tamburo v. Dworkin*, No. 04 C 3317, 2010 WL 4867346, at *2 (N.D. Ill. Nov. 17, 2010) (citations omitted) (internal quotation marks omitted).

sources is not specifically required as part of a Rule 26(f) conference, “[s]electing . . . data custodians should be a matter of cooperation and transparency among parties.”⁸⁷ If nothing else, an early discussion of the custodians and sources will identify whether a party is sufficiently preserving potentially relevant information. While some courts have issued model orders that limit the number of custodians regardless of the issues in the case or the size of the party,⁸⁸ other courts have recommended a more thoughtful approach: “[T]he selection of custodians is more than a mathematical count. The selection of custodians must be designed to respond fully to document requests and to produce responsive, nonduplicative documents during the relevant period.”⁸⁹

The early identification of custodians and data sources is not only a good practice, but it also helps parties to the extent they are claiming burdensomeness as a basis for objecting to certain discovery requests.

[A] party must articulate and provide evidence of its burden. While a discovery request can be denied if the “burden or expense of the proposed discovery outweighs its likely benefit,” a party objecting to discovery must specifically demonstrate how the request is burdensome. . . . This specific showing can include “an estimate of the number of documents that it would be required to provide . . . , the number of hours of work by lawyers and paralegals required, [or] the expense.”⁹⁰

Counsel must be willing and able to explain why the burden and/or cost of collecting, reviewing, and producing data from a particular individual, class of employees, or source of data outweighs the benefit of doing so. Consequently, the only way counsel can make such explanations is by

⁸⁷ DeGeer v. Gillis, 755 F. Supp. 2d 909, 929 (N.D. Ill. 2010).

⁸⁸ *E.g.*, Advisory Council for the U.S. Court of Appeals for the Fed. Circuit, An E-Discovery Model Order ¶ 10 (last visited Oct. 28, 2013), available at http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf (proposing a model order that limits the number of custodians to five although the court has not yet approved this model order); U.S. Dist. Court for the Dist. of Or., Order Regarding E-Discovery in Patent Cases ¶ 10 (last visited Oct. 28, 2013), available at http://www.ord.uscourts.gov/phocadownload/userupload/attorneys/tutorials_practice_tips/EDiscovery%20Model%20Order%20in%20LR%2026-6%20March%201%202013.pdf (adopting the Federal Circuit’s Advisory Council’s model order verbatim and limiting the number of custodians to five); U.S. Dist. Court for the E. Dist. of Tex., Order Regarding E-Discovery in Patent Cases ¶ 8 (last updated Feb. 28, 2012), available at http://www.txed.uscourts.gov/cgi-bin/view_document.cgi?document=22218&download=true (limiting requests to eight custodians).

⁸⁹ Kleen Products LLC v. Packaging Corp. of Am., No. 10 C 5711, 2012 WL 4498465, at *15 (N.D. Ill. Sept. 28, 2012). *See also* Eisai Inc. v. Sanofi-Aventis U.S., LLC, No. 08-4168, 2012 WL 1299379, at *9 (D.N.J. Apr. 16, 2012).

⁹⁰ *Kleen Products*, 2012 WL 4498465, at *15 (citations omitted); *see also* F.T.C. v. Church & Dwight Co., 747 F. Supp. 2d 3, 8 (D.D.C. 2010).

understanding who the proposed custodians are and what data they control.

C. The Duty of Competence in Search, Review, and Production

Perhaps nowhere is competence in discovery more demanded than in the realm of search. Counsel can preserve perfectly, identify the key custodians and sources of potentially relevant information flawlessly, and coordinate the collection of information without a hitch, and still find themselves and their client facing sanctions if they fail to search adequately and thoroughly for potentially responsive information.⁹¹

More than any other element of the EDRM, the importance of search has developed almost entirely as a result of the 2006 E-Discovery Amendments. In *National Day Laborer Organizing Network v. United States Immigration and Customs Enforcement Agency*,⁹² Judge Scheindlin addressed how the role of search has grown to such prominence in the Information Age and why it is so important that counsel are competently executing searches:

It is impossible to evaluate the adequacy of an electronic search for records without knowing what search terms have been used. In earlier times, custodians and searchers were responsible for familiarizing themselves with the scope of a request and then examining documents individually in order to determine if they were responsive. Things have changed. Now custodians can search their entire email archives, which likely constitute the vast majority of their written communications, with a few key strokes. The computer does the searching. But as a result, the precise instructions that custodians give their computers are crucial.

Thus, “[i]n order to determine adequacy, it is not enough to know the search terms. The method in which they are combined and deployed is central to the inquiry.”

Describing searches with this level of detail was not necessary in the era when most searches took place “by hand.” Then, as now, a court largely relied on the discretion of the searching parties to determine whether a document was responsive; but at least in that era, courts knew that the searching parties were actually looking at the documents with their eyes. With most electronic searches, custodians never actually look at the universe of documents they are searching. Instead, they rely on their search terms and the computer

⁹¹ Parties are required to produce any nonprivileged information that may be responsive to a discovery request unless they make a proper objection to said request. See FED. R. CIV. P. 26(b)(1), (c)(1). Responsive information is *not* synonymous with relevant information, which makes proper search methods even more important.

⁹² *Nat'l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87 (S.D.N.Y. 2012).

to produce a subset of potentially responsive records that they then examine for responsiveness.⁹³

When counsel are confronted with the need to search any substantial volume of ESI, more often than not they turn to keywords. Perhaps this is because lawyers are comfortable plugging a few words into Westlaw or Lexis and finding the case citation or law review article they need for their latest brief, or perhaps we have all become too accustomed to using Google and other search engines to scour the Internet starting with just a few words or phrases. Company data sets, however, are not at all similar to the well drafted legal opinions and treatises that form the corpus of what the legal search engines are combing through. Moreover, while e-discovery search tools, including those incorporated into email systems like Outlook and Lotus Notes, are becoming increasingly sophisticated, they cannot match the algorithms that have turned Google from a company name to a verb. As Judge Scheindlin found in *National Day Laborer*:

[M]ost custodians cannot be “trusted” to run effective searches because designing legally sufficient electronic searches in the discovery or FOIA contexts is not part of their daily responsibilities. Searching for *an* answer on Google (or Westlaw or Lexis) is very different from searching for *all* responsive documents in the FOIA or e-discovery context. Simple keyword searching is often not enough: “Even in the simplest case requiring a search of on-line e-mail, there is no guarantee that using keywords will always prove sufficient.” There is increasingly strong evidence that “[k]eyword search[ing] is not nearly as effective at identifying relevant information as many lawyers would like to believe.”⁹⁴

Stated slightly differently, relying solely on custodians to create their own keywords and then run those keywords against their own ESI in order to reach the data set that needs to be reviewed in a particular case

⁹³ *Id.* at 106–07 (footnote omitted); *see also* *Families for Freedom v. U.S. Customs & Border Prot.*, 837 F. Supp. 2d 331, 335 (S.D.N.Y. 2011) (stating that knowing the structure of an email archiving system and what search methods are being used to respond to discovery requests is insufficient because it does not indicate what Boolean connectors are used, it still does not address storage systems other than email, and “it still does not fully describe whose email archives are being searched, over what time periods, using what search terms and methods”).

⁹⁴ *Nat’l Day Laborer*, 877 F. Supp. 2d at 108–09 (alteration in original) (footnotes omitted); *see also* Maura R. Grossman & Terry Sweeney, *What Lawyers Need to Know About Search Tools: The Alternatives to Keyword Searching Include Linguistic and Mathematical Models for Concept Searching*, NAT’L L.J. (Aug. 23, 2010), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202470870777&What_lawyers_need_to_know_about_search_tools (citing three studies showing that Boolean keyword search identifies between twenty and twenty-five percent of relevant documents).

does not satisfy counsel's duty of competence when it comes to search and review.

In his ground-breaking opinion approving computer-assisted review, *Da Silva Moore v. Publicis Groupe*,⁹⁵ Magistrate Judge Andrew J. Peck discussed at length the inherent limitations of lawyers relying upon keywords when crafting a search protocol, including the gamesmanship that too often surrounds an exchange of keywords during the discovery process:

Because of the volume of ESI, lawyers frequently have turned to keyword searches to cull email (or other ESI) down to a more manageable volume for further manual review. Keywords have a place in production of ESI—indeed, the parties here used keyword searches (with Boolean connectors) to find documents for the expanded seed set to train the predictive coding software. In too many cases, however, the way lawyers choose keywords is the equivalent of the child's game of "Go Fish." The requesting party guesses which keywords might produce evidence to support its case without having much, if any, knowledge of the responding party's "cards" (*i.e.*, the terminology used by the responding party's custodians). Indeed, the responding party's counsel often does not know what is in its own client's "cards."⁹⁶

This was not the first time Judge Peck admonished the Bar about the need for competent representation when it comes to search:

This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").

....

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.⁹⁷

⁹⁵ 287 F.R.D. 182 (S.D.N.Y. 2012).

⁹⁶ *Id.* at 190 (citing RALPH C. LOSEY, ADVENTURES IN ELECTRONIC DISCOVERY 204–10 (2011) (discussing how choosing random keywords is akin to the game of "Go Fish" and that this is a poor model for e-discovery search)).

⁹⁷ William A. Gross Constr. Assoc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009); *see also* Victor Stanley, Inc. v. Creative Pipe, Inc. (*Victor Stanley I*), 250 F.R.D. 251, 262 (D. Md. 2008) (Grimm, Mag. J.) ("Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology."); Equity Analytics, LLC v. Lundin, 248 F.R.D. 331,

Judge Scheindlin echoed these sentiments and expounded upon them further in the *National Day Laborer* case a few years later:

There is a “need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or ‘keywords’ to be used to produce emails or other electronically stored information.” And beyond the use of keyword search, parties can (and frequently should) rely on latent semantic indexing, statistical probability models, and machine learning tools to find responsive documents. Through iterative learning, these methods (known as “computer-assisted” or “predictive” coding) allow humans to teach computers what documents are and are not responsive to a particular FOIA or discovery request and they can significantly increase the effectiveness and efficiency of searches. In short, a review of the literature makes it abundantly clear that a court cannot simply trust the defendant agencies’ unsupported assertions that their lay custodians have designed and conducted a reasonable search.

The more complicated question is this: when custodians *do* keep track of and report the search terms that they have used, how should a court evaluate their adequacy? As the cases cited by the parties show, the evaluation of search terms is highly context-specific: the failure to use certain search terms will sometimes be fatal, sometimes unproblematic, and sometimes improper but harmless or at least mitigated. Furthermore, even courts that have carefully considered defendants’ search terms have generally not grappled with the research showing that, in many contexts, the use of keywords without testing and refinement (or more sophisticated techniques) will in fact not be reasonably calculated to uncover all responsive material.⁹⁸

It is helpful to remember that search, whether through keywords or the use of technology, is more often than not just the means to an end, and that end is review.⁹⁹ The goal or objective of review is “to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible,”¹⁰⁰ recognizing that “relevant” is a very

333 (D.D.C. 2008) (Facciola, Mag. J.) (“[D]etermining whether a particular search methodology, such as keywords, will or will not be effective certainly requires knowledge beyond the ken of a lay person (and a lay lawyer)”); *United States v. O’Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) (Facciola, Mag. J.) (“Given this complexity [of determining the efficacy and adequacy of search], for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”).

⁹⁸ *Nat’l Day Laborer Org. Network v. U.S. Immigration & Customs Enforcement Agency*, 877 F. Supp. 2d 87, 109–10 (S.D.N.Y. 2012) (footnotes omitted).

⁹⁹ While the author is certain that some parties agree to exchange data sets after search without conducting *any* review, presumably under a “quick-peek” or “clawback” agreement, she has never been personally aware of such an arrangement after more than thirteen years of federal practice, with the last five focusing exclusively on e-discovery.

¹⁰⁰ *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189 (S.D.N.Y. 2012); *see, e.g., Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery*

broad concept. The technical terms associated with achieving this goal are known as “recall” and “precision.” As Judge Peck explained, “Recall is the fraction of relevant documents identified during a review; precision is the fraction of identified documents that are relevant. Thus, recall is a measure of completeness, while precision is a measure of accuracy or correctness.”¹⁰¹ In order to achieve the goal of finding the greatest amount of relevant documents while reviewing the least amount of non-relevant documents, counsel need to find a method of review that achieves the highest recall and precision that is available at a cost that is “proportionate to the ‘value’ of the case.”¹⁰² Not all cases will justify the predictive coding approved by Judge Peck in *Da Silva Moore*, nor do all cases require an attorney to put “eyes on” every single item before it is produced.¹⁰³ As technology progresses and data volumes increase, litigators who are unable to grasp the basic concepts and goals of search and review may find themselves unable to satisfy their duties to their clients and to the courts. Judge Peck cautions: “As with keywords or any other technological solution to ediscovery, counsel [utilizing computer assisted review] must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C) proportionality.”¹⁰⁴

III. FUTURE CHANGES IN E-DISCOVERY AND THE DUTY OF COMPETENCE

While some practitioners may have dismissed the E-Discovery Amendments as much ado about nothing when they were adopted in 2006, there can be little question that these amendments have fundamentally changed the practice of civil litigation. Competent lawyers must acknowledge and adapt to that change, but they also must be prepared for what comes next.

Can Be More Effective and More Efficient Than Exhaustive Manual Review, 17 RICH. J.L. & TECH., no. 3, art. 11, Spring 2011, at 8, <http://jolt.richmond.edu/v17i3/article11.pdf>.

¹⁰¹ *Da Silva Moore*, 287 F.R.D. at 189–90.

¹⁰² *Id.* at 190.

¹⁰³ See, e.g., Monica McCarroll et al., *Why Document Review is Broken*, WILLIAMS MULLEN NEWS (May 16, 2011), <http://www.williamsmullen.com/news/why-document-review-broken> (detailing how the typical tiered review process is inherently inefficient and explaining how “the ability to reasonably and proportionally limit discovery to those sources of ESI most likely to contain key facts” and “to efficiently distill the key facts out of the vast volume of ESI” can effectuate an efficient resolution to litigation).

¹⁰⁴ *Da Silva Moore*, 287 F.R.D. at 193.

A. Understanding and Implementing Technological Solutions Will Become the Norm

The technology surrounding the preservation, identification, collection, search, review, and production of ESI will continue to change at a rapid pace. While competent practitioners must stay abreast of these changes, they also must recognize the need to rely on experts in these areas not only to understand the technology but to ensure that their adversary and the court understand and accept it as well. In *Da Silva Moore*, Judge Peck commented:

[T]he Court found it very helpful that the parties' ediscovery vendors were present and spoke at the court hearings where the ESI Protocol was discussed. . . . Even where as here counsel is very familiar with ESI issues, it is very helpful to have the parties' ediscovery vendors (or in-house IT personnel or in-house ediscovery counsel) present at court conferences where ESI issues are being discussed. It also is important for the vendors and/or knowledgeable counsel to be able to explain complicated ediscovery concepts in ways that make it easily understandable to judges who may not be tech-savvy.¹⁰⁵

This trend of courts requiring parties to make their vendors or IT staff available to each other and the court if necessary to discuss the best way to proceed with discovery in a particular matter well in advance of any discovery deadlines will continue, if for no other reason than it will help courts better manage their dockets by ensuring that parties are not playing games with each other or running out the clock.¹⁰⁶

B. Proportionality Will Play an Increasingly Large Role in Competent E-Discovery Practice

As potential sources of ESI multiply and the volume of potentially relevant ESI increases exponentially, proportionality will continue to play a critical role in competently managing the discovery process. "If courts and litigants approach discovery with the mindset of proportionality, there is the potential for real savings in both dollars and time to resolution."¹⁰⁷ This August, the United States District Court for the District of Kansas issued its *Guidelines for Cases Involving*

¹⁰⁵ *Id.*

¹⁰⁶ See Craig Ball, *10 E-Discovery Tips for Judges*, BALL IN YOUR COURT (August 9, 2013), <http://ballinyourcourt.wordpress.com/2013/08/09/1370/> ("Tip 3: Get the Geeks Together Requiring the warring camps to designate technically-astute liaisons and making the lawyers simmer down while their experts figure things out may be the single smartest step a judge can take to promote an efficient resolution of e-discovery issues.").

¹⁰⁷ John L. Carroll, *Proportionality in Discovery: A Cautionary Tale*, 32 CAMPBELL L. REV. 455, 460 (2010).

Electronically Stored Information,¹⁰⁸ which place proportionality front and center:

The purpose of these guidelines is to facilitate the just, speedy, and inexpensive resolution of disputes involving ESI, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without Court intervention. *Parties should consider the proportionality principle inherent within the Federal Rules in using these guidelines.*¹⁰⁹

While the word “proportionality” does not appear in its text, “Rule 26(g) ‘imposes an affirmative duty [on parties] to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.’”¹¹⁰ Judge David J. Waxse, one of the committee members behind the District of Kansas’s new guidelines, recently issued an opinion taking defense counsel to task for failing to make a reasonable inquiry into the factual basis of document requests¹¹¹ and then taking plaintiffs’ counsel to task for asserting “meaningless” general objections to those document requests.¹¹² The Court found that both parties had violated the Rule 26(g) certification that the discovery request, response, or objection is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.”¹¹³ But before holding a hearing on these violations, the court ordered the parties to meet and confer and made the following “suggestion”:

[W]hile conferring, counsel may revise the document requests, responses, and objections in an effort to avoid sanctions under Rule 26(g), which the Court is mandated to assess should it find that counsel violated Rule 26(g) without substantial justification. Counsel are further instructed to read *Mancia v. Mayflower Textile Servs. Co.*, 253

¹⁰⁸ U.S. DIST. COURT FOR THE DIST. OF KAN., GUIDELINES FOR CASES INVOLVING ELECTRONICALLY STORED INFORMATION [ESI] 1 (2013), available at <http://www.ksd.uscourts.gov/guidelines-for-esi/>.

¹⁰⁹ *Id.* (emphasis added).

¹¹⁰ *Ace USA v. Union Pac. R.R. Co.*, No. 09-2194-KHV-DJW, 2010 WL 4629920, at *2 (D. Kan. Nov. 8, 2010).

¹¹¹ *Id.* (“[T]he Court is hard-pressed to conclude that a request seeking all communications concerning the [subject of the dispute] is reasonable in light of the facts known to Defendant.”).

¹¹² *Id.* (“Plaintiffs asserted numerous general objections, all of which are meaningless and waste the Court’s time. . . . Where a party has not made an attempt to show the application of the theoretical general objection, the Court will deem those general objections waived and will decline to consider them as objections at all.”).

¹¹³ *Id.* at *1 (citing FED. R. CIV. P. 26(g)(1)(A)(iii)).

F.R.D. 354 (D. Md. 2008) to assist them in complying with Rule 26(g).¹¹⁴

Had the parties here considered the principle of proportionality when they approached discovery in this case, they could have saved their clients a great deal of money and avoided wasting the court's time and patience. In the future, litigants like those here should look to resources like the District of Kansas's Guidelines or *The Sedona Conference Commentary on Proportionality in Electronic Discovery*¹¹⁵ for help. The Commentary adopted six broad principles:

1. The burdens and costs of preservation of potentially relevant information should be weighed against the potential value and uniqueness of the information when determining the appropriate scope of preservation.

2. Discovery should generally be obtained from the most convenient, least burdensome, and least expensive sources.

3. Undue burden, expense, or delay resulting from a party's action or inaction should be weighed against that party.

4. Extrinsic information and sampling may assist in the analysis of whether requested discovery is sufficiently important to warrant the potential burden or expense of its production.

5. Nonmonetary factors should be considered when evaluating the burdens and benefits of discovery.

6. Technologies to reduce cost and burden should be considered in the proportionality analysis.¹¹⁶

C. Courts Will Demand Competence When It Comes to E-Discovery

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, Judge Grimm reminds us that “[f]or the judicial process to function properly, the court must rely ‘in large part on the good faith and diligence of counsel *and the parties* in abiding by these rules [of discovery] and conducting themselves and their judicial business honestly.’”¹¹⁷ Part of this good faith and diligence is approaching discovery in a competent manner. In a recent article providing his “top ten” tips for judges regarding e-discovery, commentator Craig Ball concluded his list as follows: “Tip 10: Demand Competence[:] The next time counsel says, ‘Judge, I don’t understand this e-discovery stuff,’ don’t let it pass. Coming unprepared fosters waste, delay and injustice. It’s disrespectful to you and to our

¹¹⁴ *Id.* at *4.

¹¹⁵ The Sedona Conference, *The Sedona Conference Commentary on Proportionality in Electronic Discovery*, 11 SEDONA CONF. J. 289, 291 (2010).

¹¹⁶ *Id.*

¹¹⁷ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 525 (D. Md. 2010) (alteration in original) (quoting *Metro. Opera Ass’n v. Local 100, Hotel Emps. & Rest. Emps. Int’l Union*, 212 F.R.D. 178, 181 (S.D.N.Y. 2003)).

justice system. Demand competence in ESI from counsel in matters involving ESI.”¹¹⁸

The author agrees. Every lawyer practicing under the Federal Rules of Civil Procedure should take the time and make the effort to gain the “knowledge, skill, thoroughness, and preparation” necessary to practice discovery in a competent matter. Our clients should demand it, and more and more, our courts will too.

¹¹⁸ Ball, *supra* note 106.